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IN THE

Supreme Court of the United States

October Term, 1967

No. 520

THE BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, PHILADELPHIA GAS WORKS DIVISION OF THE UNITED GAS IMPROVEMENT COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

v.

FEDERAL POWER COMMISSION *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY FOR PETITIONERS

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October 4, 1967

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In its memorandum in response to petitions for certiorari in this and related dockets, Respondent Federal Power Commission

1. Agrees that the in-line initial price question (Question 1 presented by the petition in No. 520) warrants review by this Court;

2. Disagrees that the need issue (Question 2 presented by the petition in No. 520) warrants such review; and

3. Urges that the petition in No. 520 be held to abide this Court's final disposition of petitions in Nos. 60-62, 80, 97 and 503 in which review is sought of the decision of the Tenth Circuit in *Sunray DX Oil Company* v. *Federal Power Commission* (*Sunray*), 370 F.2d 181.

Petitioners take exception to the Commission's position on the latter two points.

The Need Issue

Respondent's ambiguous position on the need issue emphasizes the necessity for this Court to resolve the conflict between the decision below and that of the DC Circuit in *Public Service Com'n of State of N. Y.* v. *Federal Power Com'n* (*Hawkins*), 373 F.2d 816.

Respondent's initial contention (Memo., p. 5), that "no real conflict exists" between the two decisions, is simply inconsistent with the facts. It is clear that the court below considered its decision on this issue to be in conflict with that of the DC Circuit, and its opinion frankly says so.[1] It is also clear that, although different producer-sellers and pipeline-purchasers were involved, the two cases dealt with

1. "In *Public Service Com'n of State of N. Y.* v. *Federal Power Com'n, supra,* that court found that there was no showing of public need and that such a decision must be made before a permanent certificate is granted to a producer.
With deference we disagree." 378 F.2d 510, at p. 526.

the same issue, presented in the same way, by the same parties, and it is hardly disputable that the courts reached opposite conclusions.

Nevertheless, petitioners would not find it necessary to press their request that the conflict be resolved by this Court, had respondent come forward forthrightly with the assurance that the Commission was prepared to adopt the same remedial action in this case as it concedes is required in *Hawkins*. That assurance, however, is conspicuously and significantly omitted from respondent's memorandum.

While respondent acknowledges that the DC Circuit's *Hawkins* decision requires at least "a more detailed explanation of the result reached by the Commission *in that case*" (Memo., p. 5, emphasis supplied) and while it is conceded that the requirement does not impose any significant administrative burden on the Commission, respondent has made no commitment to undertake similar action *in this case* or any other in which the same issue may arise.[2] In the absence of such a commitment, it is perfectly plain that a very real and important conflict exists between the decision below and that of the DC Circuit and that, without the grant of certiorari, this conflict may be perpetuated in the ultimate resolution of the two cases. Even more important, in view of respondent's refusal to acknowledge

2. Ironically, the original "explanation of the result reached" was far more detailed in *Hawkins*, in which respondent concedes the obligation to furnish a "more detailed explanation," than in the instant case, in which respondent has not indicated willingness to take any further action. In Opinion No. 478, the Commission decision reviewed in the proceedng below, the sole "explanation" for the result reached was that petitioners' contentions on the need issue had been "answered in *Hawkins* where we held that 'the issue of public need properly belongs in pipeline certificate cases, not producer applications'." J. A. 446.

the applicability of the DC Circuit's decision to any case other than *Hawkins,* the conflict is likely to be intensified by subsequent Commission decisions which will be subject to appeal, depending on the party aggrieved, in either the Fifth or DC Circuit.

Under the circumstances, clarification by this Court of the Commission's responsibility in producer certificate cases with respect to the crucial issue of evidence of need for the gas, is urgently required.

The Request to Defer

In support of its request that action on the petition in this case be deferred pending action on the petitions seeking review of the Tenth Circuit's *Sunray* decision, respondent relies on the reasons set forth in the FPC's petition in No. 144 and its memorandum in No. 231. In support of their opposition to this request, petitioners rely on the reasons set forth in their memorandum (as respondents) in Nos. 111, 143 and 144. Except for the filing of petitions for certiorari in the instant case in the summer of 1967, the procedural posture of the cases is essentially the same today as it was when that memorandum was prepared.

In that memorandum petitioners urged that simultaneous consideration of the *Sunray* and *Hawkins* cases was essential to an accurate understanding of the factors which actually moved the Commission to elevate its price line for the period after September 1960. We suggest that simultaneous consideration of those cases and this one will be even more illuminating on that subject, since this case was

a direct successor to *Sunray,* involving the same producing area, and the Commission's principal justification for the initial price determination reached here was the price line it had authorized for the *Sunray* sales.

For the foregoing reasons, petitioners respectfully reassert their request for the grant of certiorari in this case.

Respectfully submitted,

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